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LAW OFFICES  
**LEVENTHAL, SENTER & LERMAN P.L.L.C.**

SUITE 600  
2000 K STREET, N.W.  
WASHINGTON, D.C. 20006-1809

TELEPHONE  
(202) 429-8970

TELECOPIER  
(202) 293-7783

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WRITER'S DIRECT DIAL  
202-416-6755

WRITER'S DIRECT FAX  
202-429-4603

WRITER'S E-MAIL  
BGARDNER@LSL-LAW.COM

NORMAN P. LEVENTHAL  
MEREDITH S. SENTER, JR.  
STEVEN ALMAN LERMAN  
RAUL R. RODRIGUEZ  
DENNIS P. CORBETT  
BRIAN M. MADDEN  
BARBARA K. GARDNER  
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ROSS G. GREENBERG  
JOHN D. POUTASSE  
MATTHEW H. BRENNER  
CHRISTOPHER J. SOVA

**BY HAND**

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

**Re: Ex Parte Presentation  
MM Docket No. 93-25**

Dear Ms. Salas:

On September 30, 1998, representatives of Children's Television Workshop ("CTW") and Viacom Inc. met with Helgi Walker, Legal Advisor to Commissioner Furchtgott-Roth, to discuss the above-referenced proceeding, specifically the qualification of Noggin as a "national educational programming supplier" under Section 25(b)(3) of the 1992 Cable Act. CTW's representatives were Barbara Gardner and Mark MacCarthy, and Viacom was represented by Anne Lucey.

The presentation was limited to issues addressed in the attached paper headed "DBS Set-Aside," a copy of which was provided to Ms. Walker, and points made in written ex parte presentations submitted on behalf of Noggin on August 19, 1998 and September 22, 1998.

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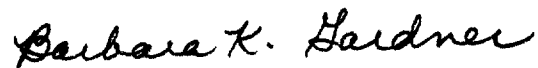
Magalie Roman Salas

October 1, 1998

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Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter are hereby submitted.

Respectfully submitted,

A handwritten signature in cursive script that reads "Barbara K. Gardner".

Barbara K. Gardner

Enclosure

cc with encl. (by hand):

Helgi Walker, Office of Commissioner Furchtgott-Roth

Rick Chessen, Office of Commissioner Tristani

Ari Fitzgerald, Office of Chairman Kennard

Susan Fox, Office of Chairman Kennard

Jane Mago, Office of Commissioner Powell

Rebecca Arbogast, International Bureau

## DBS Set-Aside

Section 25(b) of the 1992 Cable Act requires DBS providers to set aside capacity for noncommercial educational or informational programming. Commission staff is currently drafting rules to implement this statute that may disqualify Noggin from set-aside carriage. *Eligibility under the set-aside is critical to Noggin if it is to obtain wider DBS carriage.*

**What is Noggin?** Noggin is a noncommercial, educational program service for kids. It is a joint venture between Children's Television Workshop ("CTW"), a non-profit entity, and Nickelodeon, a for-profit entity. It cannot deviate from its noncommercial educational mission without CTW's consent. As required by federal tax law, it is a for-profit entity.

**Section 25(b) of the 1992 Cable Act:** The intended beneficiaries of the set-aside provision appear to be non-profit educational entities, like CTW itself. But the statute does not explicitly limit the set-aside to *pure* non-profits. Indeed, the only direct reference to "non-profit" in the statute can be found in Section 25(b)(4), the carriage fee provision, which directs the Commission to take into account the non-profit "character" of the programming provider. The statute is silent on the question of non-profit/for-profit joint ventures.

To cover the costs of producing high quality educational programming, many top-rated children's educational shows are co-produced by non-profit and for-profit entities. For practical business reasons, such co-producers must create a separate business entity — a joint venture — when they provide a full channel of programming. Since the Federal tax code precludes these joint ventures from being structured as non-profit entities, the FCC staff's potential insistence on a non-profit business structure would exclude all joint ventures involving for-profits. To do so would elevate form over substance.

**Noggin's Proposal:** Noggin has proposed in *ex parte* submissions that joint ventures formed by non-profit educational institutions with for-profit companies should qualify for the set-aside if the non-profit partner:

1. has 50/50 control over the venture, including its programming, personnel, finances and educational mission;
2. contributes 40% or more of the venture's equity;
3. would independently qualify for the set-aside as an educational organization;
4. has experience in providing educational programming; and
5. makes a multi-year commitment to the joint venture.

Under this proposal, Noggin would qualify for the set-aside, factually and legally. Specifically, with respect to the locus of control, Commission tests look to the entity able to direct the programming, personnel and finances of a venture. Like affirmative control, the Commission views "negative" control —or 50/50 shared voting— as control.

Noggin believes that it would be economically unrealistic for the Commission to require that the non-profit partner possess affirmative control. That is because a for-profit company will not be incentivized to provide extensive financial support for a programming venture only to cede all control to the non-profit partner.

**Conclusion.** CTW itself qualifies for the set-aside. Because CTW jointly determines all aspects of Noggin's operation and can block any deviation from its noncommercial educational mission, Noggin too should be eligible for the set-aside. To deny access to Noggin would disserve viewers by eliminating from the DBS set-aside an important new source of educational programming.